

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
November 6, 2007 Session

**DEWITT KENNARD, ET AL v. AMSOUTH BANK, AS THE SUCCESSOR
CORPORATION TO FIRST AMERICAN BANK**

**Appeal from the Circuit Court for Davidson County
No. 02C2123 Hamilton Gayden, Judge**

No. M2007-00075-COA-R3-CV - Filed February 12, 2008

Plaintiffs DeWitt Kennard and Susan Kennard Walker appeal the trial court's order granting summary judgment in favor of the Defendant, AmSouth Bank. The Plaintiff, residuary beneficiaries of a testamentary trust created in 1957 filed a complaint against Defendant, co-trustee of the trust, alleging negligent mishandling of the trust. We affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

JON KERRY BLACKWOOD, SR. J., delivered the opinion of the court, in which PATRICIA J. COTTRELL, P. J., M. S. and ANDY D. BENNETT, J., joined.

G. Kline Preston, Nashville, Tennessee, for appellants, DeWitt Kennard and Susan Kennard Walker

William L. Harbison, J. Scott Hickman and Lisa K. Helton, for appellee, AmSouth Bank

OPINION

Factual Background

On August 16, 1956, Mamie Binns Bradley executed a last will and testament which created the trust in issue. Ms. Bradley's husband, Eugene, and sister, Lucile Binns Barnett, were named co-trustees with the Defendant.¹ The trustees were granted full power and authority to sell any or all of Ms. Bradley's property, without the permission of any named beneficiaries. The income from the trust was to be paid to three named beneficiaries: her husband, sister, and daughter, Mary Lou Barnett Bell. The trust directed that the daughter's monthly income should never fall below three hundred dollars and allowed the trustees to draw on the corpus of the trust if the monthly amount fell below three hundred dollars. The monthly amounts to the daughter were not limited to three hundred dollars per month if the trustee's felt further encroachments should be made. The trust was to

¹ AmSouth Bank is successor to First American Bank.

continue until the later of: (1) the death of the last beneficiary, or (2) the youngest child of Dewitt T. Kennard Sr., then living, reached his or her twenty-fifth birthday.² At such time the trust was to be divided in equal shares to the children of DeWitt T. Kennard Sr. The trustees were authorized to make advancements out of the corpus for the benefit of Ms. Bradley's daughter as in the absolute discretion of the trustee are reasonable and the power to encroach was to be liberally construed.

Ms. Bradley died on June 15, 1957, and her will was probated shortly thereafter. Among the assets of the trust was real property located at 1707-09-11 Eighteen Avenue South, Nashville, Tennessee. For some years thereafter, the trustees managed this property and distributed the income among the beneficiaries. Lucille Barnett died in 1969 and Eugene Bradley continued to serve as co-trustee with Defendant. In 1974, the real property in Nashville was sold for \$140,000, as evidenced by a promissory note for \$100,000 bearing 9% interest and \$40,000 in cash. Eugene Bradley died after the sale of this property and Mary Lou Barnett Bell became the sole income beneficiary of the trust. The Defendant continued to pay the income from the trust to Ms. Bell as well as encroaching on the corpus as provided for in the provisions of the trust. Following Ms. Bell's death in 2002, Plaintiffs became the beneficiaries of the trust. At that time, the trust contained approximately \$10,000. On July 25, Plaintiffs filed a complaint alleging that the Defendant negligently managed, administered, or wasted the assets of the trust. On January 3, 2007, the trial court granted summary judgment in favor of Defendant finding that Plaintiffs failed to show "insider fraud or negligence on the part of AmSouth." Further the trial court found Defendant to be entitled to summary judgment under the doctrine of laches.

Standard of Review

The standard for review to be applied when assessing a motion for summary judgment was set forth by our Supreme Court in Staples v. CBL & Associates, 15 S.W.3d 83, 88 (Tenn. 2002):

The standards governing an appellate court's review of a motion for summary judgment are well settled. Since our inquiry involves purely a question of law, no presumption of correctness attached to the lower court's judgment, and our task is confined to reviewing the record to determine whether the requirement of Tenn. R. Civ. P. 56 have been met. *See Hunter v. Brown*, 955 S.W.2d 49, 50-51 (Tenn. 1997); *Cowden v. Sovran Bank/Central South*, 816 S.W.2d 741, 744 (Tenn. 1991). Tennessee Rule of Civil Procedure 56.04 provides that summary judgment is appropriate where: (1) there is no genuine issue with regard to the material facts relevant to the claim or defense contained in the motion, *see Byrd v. Hall*, 847 S.W.2d 208, 210 (Tenn. 1993); and (2) the moving party is entitled to a judgment as a matter of law on the undisputed facts. *See Anderson v. Standard Register Co.*, 857 S.W.2d 555, 559 (Tenn. 1993). The moving party has the burden of proving that its motion satisfies these requirements. *Downen v. Allstate Ins. Co.*, 811 S.W.2d 523, 524 (Tenn. 1991). When the party seeking summary judgment makes a properly

² Plaintiffs are the children of DeWitt T. Kennard Sr.

supported motion, the burden shifts to the nonmoving party to set forth specific facts establishing the existence of disputed, material facts which must be resolved by the trier of fact. *See Byrd v. Hall*, 847 S.W.2d at 215.

To properly support its motion, the moving party must either affirmatively negate an essential element of the nonmoving party's claim or conclusively establish an affirmative defense. *See McCarley v. West Quality Food Serv.*, 960 S.W.2d 585, 588 (Tenn. 1998); *Robinson v. Omer*, 952 S.W.2d 423, 426 (Tenn. 1997).

Analysis

Plaintiffs assert that, for the purpose of summary judgment, the Defendant has the initial burden of proof to establish that it did not commit a breach of trust. Tennessee Code Annotated § 35-15-1001 defines a breach of trust as a "violation of a duty the trustee has to a beneficiary". A trustee is under a duty to the beneficiary in administering the trust to exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property; and if the trustee has greater skill than that of a man of ordinary prudence, he is under a duty to exercise such skill as he has. *Clark v. American National Bank & Trust Co.*, 531 S.W.563, 368 (Tenn. Ct. App. 1974)(quoting Restatement of Trust §174). A court of equity requires the utmost good faith from trustees, and conclusively presumes that acts done by them in regard to the trust property are done for the benefit of the *cestui qui trust*. *Treadwell v. McKeon*, 66 Tenn. 445, 450 (1874). In applying these principles, the initial burden to establish a breach of trust rests with the Plaintiffs.

Plaintiffs' depositions indicate that their claims against the Defendant rest upon their assertion that the amount of the money should be greater. Plaintiffs do not contest the encroachments made by the trustees for the benefit to Ms. Bell. In their depositions, Plaintiffs do not state any specific facts or action taken by AmSouth that were negligent or constituted a breach of trust. In response to the question regarding any particular act, or failure to act, on behalf of the Bank, Plaintiff DeWitt Kennard responded as follows:

Not that I can specifically say that they did . . . I mean we can say that whatever assets that they [had] . . . the cash that they got when they sold this real estate, how they managed it, I don't know. I don't know . . . [A]ppears to me that the dollar amount should be higher than it is today and how this money was managed, I don't know, but it seem disappointingly small.

In answer to the question that asked if he was aware of any specific facts that would suggest that the sale of the real property was negligent, Mr. Kennard responded, "Not to my knowledge."

Tennessee Code Annotated § 35-15-1003 provides that "[a]bsent a breach of trust, a trustee is not liable to a beneficiary for a loss or depreciation in the value of trust property or for not having made a profit." Other than the diminution of the value of the trust, Plaintiffs have failed to identify any act or omission by the Defendant to establish a breach of trust. The Plaintiffs complain that the

sale of the real property in 1974 was not properly handled, but have failed to establish any facts that would establish a breach of trust. The trust empowered the trustees with “full power and authority” to sell the property. Tennessee Code Annotated § 35-15-1006 provides that “[a] trustee who acts in reasonable reliance on the terms of the trust as expressed in the trust instrument is not liable to a beneficiary for a breach of trust to the extent the breach resulted from the reliance.”

Finally, Plaintiffs assert that the Defendant’s failure to provide an accounting and appraisal of the 1974 real property sale and annual statements constitutes negligence. Section 35-15-813(1) Tennessee Code Annotated provides as follows:

A trustee shall keep the beneficiaries of the trust who are current mandatory or permissible distributees of trust income or principle, or both, reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests.

This section does not require an accounting to the beneficiaries. Further, Plaintiffs have failed to show how the failure to provide an appraisal of the real property sold in 1974 to contingent beneficiaries establishes negligence on the part of the Defendant.

In summary, the burden of proving their claim for breach of trust rests upon the Plaintiffs. The Plaintiffs have failed to satisfy their burden.

Conclusion

The judgment of the trial court is affirmed. The cost of this appeal is assessed against the Plaintiffs/Appellants.

JON KERRY BLACKWOOD, SENIOR JUDGE